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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. .....

LENNIS VERRET, ET AL,
Petitioners-Appellees Below

versus

OIL TRANSPORT COMPANY, INC., and
CHARLES C. SMITH COMPANY,
Respondents-Appellants Below

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of LENNIS VERRET, MRS. JEAN D. RANDOLPH, MRS. MONETTE M. LYNCH, MRS. A. W. ASHLEY, MRS. ELIZABETH ASHLEY WORTHAN, MRS. LUCILLE E. WELDON AND MRS. GERTRUDE

PICARD CUSHING, claimants in consolidated limitation of liability proceedings instituted by Oil Transport Company, Inc. and Charles C. Smith Co. pursuant to the Limitation of Shipowners Liability Act (46 U.S.C. 181 *seq.*) respectfully shows to this Honorable Court:

A.

OPINIONS BELOW

The opinion of the District Court (R. p. 1190) is reported *sub nom. In re Oil Transport Co.* in 178 F. Supp. 48, and of the Court of Appeals *sub nom. Oil Transport Co. v. Verret* in 278 F.2d 464.

B.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated May 17, 1960. An extension of time within which to petition for certiorari to the United States Supreme Court was granted by an order dated August 15, 1960, extending the time to and including September 6, 1960.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 1254(1).

C.

QUESTIONS PRESENTED

The questions presented by the decision of the Court of Appeal, Fifth Circuit and this application are:

1. Whether a proceedings in limitation of shipowner's liability is properly invoked by a petition based on false affidavits of no strippings or values remaining after the catastrophe, and without the surrender of the vessel, or her wreckage, strippings, et cetera, or the filing of an *ad interim* stipulation with sureties for their value or for costs, as required by 46 U.S.C. 185 and Admiralty Rule 51, where petitioners for limitation actually knew of the existence of strippings and values in existence at the time of the filing of the petitions for limitation and false affidavits in connection therewith.

2. Whether the Court obtains jurisdiction of a limitation of liability proceedings provoked on the basis of false affidavits of no strippings or values, et cetera, remaining, where petitioners for limitation neither surrender the sunken vessel, its strippings, proceeds, et cetera, to a trustee, nor file an *ad interim* stipulation for values and costs, as required by 46 U.S.C. 185 and Admiralty Rule 51, and thus place no *res* before the Court to which its jurisdiction can attach, despite their knowledge of the actual existence of strippings and values at the time of the filing of the petitions for limitation and false affidavits in connection therewith.

3. Whether, under any circumstances, a valid limitation of liability proceedings can be provoked, or the jurisdiction of the admiralty court can attach to a limitation proceedings, without the petitioners for limitation, as a condition precedent, within six (6) months after written notice of a claim, either

surrendering the vessel, or her wreckage, strippings and proceeds, et cetera, to a trustee, or furnishing an *ad interim* stipulation with approved security for the payment into court *whenever the court shall so order*, of the aggregate amount of the petitioner's interest in the vessel, its strippings, proceeds, et cetera, and costs, as mandatorily required by 46 U.S.C. 185 and Admiralty Rule 51.

4. The Circuit Court of Appeal held, with respect to each item of values found by the District Court to have existed at the time of the limitation proceeding, (see *infra* pp. 10, 11, for list of items) that the failure of petitioners in limitation to surrender or stipulate for any one of them was cured because "petitioners clearly tendered the vessel alleged to be worthless and tendered such stipulation as, upon reference, the Court might find the true value to be"; and, the Circuit Court of Appeal reasoned, the District Court could always require the petitioners in limitation to make good on its tender and actually file a stipulation for the value of each item, even after six (6) months. This raises the questions:

   a. Is a mere offer, without surety, to stipulate, equivalent to the *ad interim* stipulation "with sufficient sureties or an approved corporate surety," or the actual surrender of the vessel, and values, required by 46 U.S.C. 185 and Admiralty Rule 51?

   b. Are claimants in limitation deprived of the pro-

tection of "sufficient sureties or approved corporate surety" provided for them by 46 U.S.C. 185 and Admiralty Rule 51 during litigation over values on the mere allegation and false affidavits of a petitioner for limitation that the vessel is worthless and there are no values after the catastrophe, and a mere unsecured offer to furnish a stipulation with sureties later?

c. Is the statutory and Rule requirement of furnishing a stipulation with sureties, or surrendering the vessel, within six (6) months of the filing of a claim in writing abolished by this decision, and a mere unsecured offer to stipulate substituted in its place?

5. Whether, where petitions are filed under the above circumstances, the failure to surrender the vessel, et cetera, or to file an *ad interim* stipulation, can be cured by the filing of *ad interim* stipulations nine (9) and seventeen (17) months, respectively, after written notice of claims, despite the statutory requirement of 46 U.S.C. 185 that such stipulations must be filed, or surrender made, with six (6) months of written notice of claim.

6. Whether in a limitation proceedings involving injury to, or death of crew members, the barges (or their value) comprising part of an integrated tow must be surrendered along with the towboat; or whether such a principal is so "doubtful" as to excuse Owners and Operators from surrendering

same, or furnishing any stipulation with sureties for their value, as held by the Circuit Court of Appeal.

7. Whether the tort claim of petitioners in limitation against the Railroad should have been surrendered in the limitation fund, by stipulation with approved sureties or otherwise, and should petitioners have been charged with its value on permitting it to become time-barred and prescribed without being tried, as the District Court held — or was the Circuit Court of Appeal correct in treating the tort claim as immaterial.

8. Whether the fact that the "strippings" of the JANE SMITH in the form of a lifeboat valued at $100.00 (plus the gear referred to on page 10), was, as held by the Court of Appeal, a "nominal item" not required to be stipulated for despite the express requirement of Admiralty Rule 51 that a stipulation must be furnished for "strippings."

9. The Court of Appeal excuses petitioner's false affidavits of no value, and their faliure to file a stipulation for existing values, on their "good faith" and "absent any finding of bad faith." Can good or bad faith substitute for the statutory and Rules requirements of an *ad interim* stipulation, with sureties, "for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest . . . and costs?" (see Admiralty Rule 51)

10. Can a petitioner possibly be in "good faith" — or "absent bad faith" — in petitioning for limitation of liability on a mere offer, without any surety, to furnish a stipulation, without actually furnishing the *ad interim* stipulation required by Admiralty Rule 51

> "with sufficient sureties or an approved corporate surety, for the payment into court *whenever the court shall so order*, of the aggregate amount of the value of petitioner's interest . . . and costs" (Emphasis added)

which is an elaboration of the statutory requirement of 46 U.S.C. 185 that

> "the owner (a) *shall deposit* with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner, or approved security therefor . . ." (Emphasis added)

11. In view of the fact that the District Court, contrary to Admiralty Rule 46½, made no findings of fact nor conclusions with respect to the seaworthiness of the vessel, negligence, and the privity of the petitioners for limitation therein, in failing to furnish necessary facilities and crew to maintain proper lookouts, knowingly permitting the vessel to operate without lookouts, and in imposing on the Master and helmsman manifold duties beyond his capacity by under-crewing the vessel and withholding lookouts, was the Court of Appeal justified in affirming the District Court's decision per-

mitting limitation? Or should the Court of Appeal, under its *de novo* appellate jurisdiction in Admiralty, have passed on such questions itself, or at least have remanded the case to the District Court for specific findings of fact and conclusions of law on the issues so raised?

12. Does the evidence justify holding Weldon and Verret each 50% negligent, and petitioners for limitation entirely free from fault?

D.

Statutes and Rules Involved

On the limitation of shipowner's liability issues involved in this case, the following statutes and rules are involved:

The Limitation of Shipowner's Liability Act, 46 U.S.C. 185;

United States Supreme Court General Admiralty Rule 51 — *Limitation of Liability — How Claimed.*

On the issue of lookouts, and the failure of the lower courts to make findings of fact and conclusions of law with respect thereto, the following statutes and rules are involved

Western Rivers Navigation Rule 26, *Usual Additional Precautions Required*, 33 U.S.C. 351;

United States Supreme Court General Admiralty Rule 46½, *Finding of Fact and Conclusions of Law.*

The aforementioned statutes and rules are printed as Appendix D hereof, *infra* p. 71.

E.

FACTS

I. The Catastrophe[1]

Petitioners here are the widows and one survivor of the crew of the Towboat JANE SMITH, a vessel 100′ in length by 22′ beam, which sank on May 19, 1950 at 9:30 P.M. in the Atchafalaya River near Melville, Louisiana, while pushing downstream two (2) empty oil barges, each 240′ long by 50′ beam, made up in tandem, all owned by Charles C. Smith Co. and chartered bareboat to Oil Transport Co., Inc. The sinking resulted when the integrated tow became misaligned while backing and filling three times awaiting the delayed opening of the Texas & Pacific Railroad Company Bridge draw span. On her third try through the draw, having meantime become misaligned at an angle, the lead barge of the integrated tow first scraped her port forward quarter along the east pier, then scraped her starboard aft quarter against the west pier of the draw span, the second barge also scraping the east pier midships, all with only "slight damage," whereupon the barge portion of the integrated tow passed safely through the span with all integrating cables holding fast. However, the starboard face cables lashing the Towboat JANE SMITH to the No. 2 barge parted, and the JANE SMITH jackknifed out of control around the east pier of the span and collided therewith, severing the port cables. Thereupon the super-

[1]The following description is based on the Petition, R. 7-8, and on the District Court findings, *infra* p. 50-53.

structure of the JANE SMITH, floating free from her barges, was brought up and held fast against the fixed span of the bridge by the swift currents of the Atchafalaya River, which sucked her hull downstream and swept her under the bridge, heeling her over and causing her to sink. Five (5) crew members, represented by claimants herein, were drowned, and Lennis Verret was severely injured.

II. The Wreckage, Strippings and Proceeds

At the time of and immediately after the casualty, in addition to the wreckage of the Towboat JANE SMITH, then lying at the bottom of the Atchafalaya River, the following wreckage, strippings and proceeds of the integrated tow, having very substantial values, existed to the full knowledge of Charles C. Smith Co. and Oil Transport Company, Inc.:[2]

1. Two (2) oil barges, each 240′ in length by 50′ beam, stipulated to have "substantial value."

2. Gear of the Towboat consisting of:

   a. The undamaged cable, gear, ratchets, et cetera, lashing the two barges together.

   b. The damaged cable and undamaged gear, ratchets, pelican hooks, et cetera, on the No. 2 barge to which the JANE SMITH was lashed.

3. The lifeboat of the JANE SMITH valued at $100.00.

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[2]R. 1097-1103; 1110-13.

4. A tort claim by Oil Transport and the Charles C. Smith Co. against Texas & Pacific Railroad Company, the bridge owners, based on the absence of fenders and protective pilings around the draw, and on the delayed opening of the span, valued by the District Court at $145,000.00.[3]

III. The False Affidavits

Despite the existence of such substantial wreckage, strippings and proceeds remaining after the casualty, Oil Transport Company, Inc., and Charles C. Smith Co., in petitioning for limitation of liability, annexed to their petitions affidavits, found by the District Court to be false,[4] stating that the Towboat JANE SMITH must be deemed a total loss, and that

> "her wreckage, strippings and proceeds have no value . . . neither the vessel, nor her wreckage, strippings or proceeds, had any value whatsoever when said vessel was sunk on May 19, 1950, nor have they any value today."[5]

IV. Limitation Sans Stipulation

On the basis of the foregoing false affidavits, petitioners neither surrendered the JANE SMITH, or the valuable oil barges, tort claim, gear and lifeboat listed in Article II hereof to a trustee in limitation; nor did they file any stipulation with sureties whatsoever for their value, or even for costs, as alternatively mandatorily required as a conditon precedent to the filing of a limitation of liability proceedings by 46 U.S.C. 185 and Admiralty

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[3]Petition, Art. 22, R. 9; Order, R. 163, 170.
[4]R. 1195. [5]R. 20, 21.

Rule 51 of this Honorable Court. Indeed, Oil Transport and the Charles C. Smith Co. took no action whatsoever on their tort claim against the Railroad, and permitted same to be lost by limitation and laches. It was not until November 19, 1951, that even an insufficient stipulation in the amount of $25,000.00, representing the salvage value of the JANE SMITH alone (which the District Court subsequently ordered increased to $170,000.000 to cover the value of the prescribed tort claim), was filed by each petitioner;[6] but these stipulations were filed seventeen (17) months after the written claim filed by Verret against Oil Transport Company, Inc.,[7] and nine (9) months after the written claim filed by Cushing against Charles C. Smith Co.,[8] whereas 46 U.S.C. 185 requires a stipulation to be filed within six (6) months after written notice of claim.

V. The Motions to Dismiss

Claimants (except Verret) filed appropriate motions to dismiss the limitation proceedings on the following two grounds:[9]

1. That petitioners having failed to comply with the mandatory requirements of 46 U.S.C. 185 and Admiralty Rule 51 by neither surrendering the vessel nor filing an *ad interim* stipulation with sureties for values and costs in the limitation proceedings within six (6) months of the filing of written claims, limitation was not properly invoked.

2. The District Court was without jurisdiction of the limitation proceedings because:

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[6]R. 110. [7]R. 26. [8]R. 62.
[9]R. 50, 116.

a. No *res* was before the Court, none having been surrendered to a trustee; and

b. No *ad interim* stipulation with surety was filed with the Court to take the place of a *res*.

VI. District Court Decision

a. Upholding Motions to Dismiss

The District Court preliminarily overruled the foregoing motions to dismiss. Answers were duly filed by all claimants denying the right of petitioners to limit, and reiterating the above ground of dismissal. After a trial on the merits of limitation, the District Court reverted to the motions to dismiss and held:[10]

> "It is now the holding of this Court that the motion is good and should be granted because of failure of petitioner to comply with the limitation statute. 46 U.S.C. 185. At the time the motion was filed, there was no res before the Court, six months had elapsed from the time the first claim was filed and, consequently, petitioner's right to limit no longer existed. *Petition of Goulandris*, 2 Cir., 140 F(2d) 780. Compare *Black Diamond SS Co. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386.
>
> Moreover, although it was represented by the charterer in its petition for limitation that the JANE SMITH was a total loss and that no stipulation, however small, was required to preserve the right to limit, it now appears that a lifeboat of the JANE SMITH was salved, together with the two barges. Since this was an integrated tow, and the barges and the tug had the same charterer and owner, these barges, or their value, should

[10]R. 52, 118, 1194; *infra* p. 53-4.

have been surrendered. (Citing authorities) It is noted that in obtaining its injunction pursuant to the limitation proceedings, petitioner was careful to include the barges under its protection. In addition, the third party claim of the JANE SMITH against the railroad was not surrendered and petitioner has allowed this claim to prescribe. Now the petitioner argues that the claim was worthless, but the allegations in its limitation petition would indicate otherwise."

b. On the Merits

Despite the District Court's holding that it was jurisdictionless in these proceedings, it nevertheless went on to decide the merits of the issues of limitation "for use in the event an appellate court finds the denial improvident." On the merits the District Court found in favor of claimants on the issue of exoneration or fault, but against claimants on the issue of limitation.

1. As To Limitation

As to limitation, claimants had urged denial principally on the ground of unseaworthiness of the vessel and negligence with the knowledge and privity of both owners and charterers in the following respects:

1. In failing to furnish the necessary facilities[11] and crew to maintain proper lookouts,[12] and in knowing-

[11]The bow of the lead barge had no place for a lookout to stand watch and, being without rails, a lookout could not safely stand there. Moreover, the lead barge bow was some 500' from the pilothouse, and communication therewith was impossible without intercommunication system, such as a telephone connection. The tow was equipped with a telephone from wheelhouse to galley, but not from wheelhouse to any lookout station. R. 1017, 1040, 1129, 1131.

[12]Only two (2) deckhands—one of them color-blind—were furnished, each of whom worked two six-hour shifts (or 12 hours) per day, and

ly permitting the vessel to operate without any lookouts.

2. In under-crewing the vessel and thus imposing on the Master — who also had to act at helmsman — duties beyond his capacity in requiring him to act at the same time as Master, helmsman, lookout, and perform other duties as well.

3. In sending the vessel on a voyage on the treacherous Atchafalaya River without a competent and qualified Atchafalaya River pilot.

4. In permitting the vessel to be equipped with frayed towing gear which parted in the emergency at the Melville Bridge, in having defective rudders and improper design.

The District Court found the facts and law against claimants on Items 3 (competency of the Atchafalaya River pilot and 4 (existence of frayed cable, etc.); but made absolutely no findings or conclusions with respect to Items 1 (furnishing necessary facilities and crew to maintain proper lookouts and permitting the vessel to operate without lookouts) or 2 (under-crewing vessel and thus imposing on Master-helmsman manifold duties beyond the capacity of any one man).[13] It is respectfully submitted that findings and conclusions on Items 1 and 2 above are material, essential and critical to the issue of the right of the owners and charterers to limit their liability, and are required to be found and stated by the District Court. Admiralty Rule 46½.

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neither of whom ever regularly stood watch as lookout. At the time of the disaster, the color-blind deckhand, instead of acting as lookout, was engaged in getting the Master coffee! R. 1038, 1045, 1095-6, 1129.

[13]See Opinion, *infra* pp. 55-57.

2. *As To Fault*

As to fault, the District Court held that the attempt to run the draw while misaligned,

> ". . . was not a mistake of judgment. This was gross negligence, unworthy of experienced seamen. Captain Weldon and Captain Verret were equally at fault, each was 50 per cent responsible for the casualty."[11]

Claimants had urged that the fault lay, not with Weldon nor Verret, who had done their best under the conditions imposed on them; but rather with the owners and operators of the integrated tow, who failed to furnish the Master with a sufficient crew to maintain lookouts in the bow (i.e., on the bow of the lead barge of the integrated tow some 500' forward of the pilot house, while the Master was forced to act additionally as helmsman and as his own "lookout"); who failed to furnish a safe place in the bow of the lead barge for a lookout to work; who condoned and approved the navigation of the 580' integrated tow in treacherous rivers and through narrow drawbridges without proper lookouts; and who failed to furnish any method of communication (such as the telephone system which existed from wheelhouse to galley) for a lookout some 500' forward of the wheelhouse to warn the Master of danger or misalignment.

As pointed out above, the District Court made no findings nor any conclusions with respect to the operation of the vessel without any proper lookouts; nor did it make any findings or conclusions with respect to the adequacy of a crew, the existence of adequate facilities for a proper

[11] *Infra*. p. 58.

lookout, or the extent to which an inadequate crew and the absence of a lookout and facilities therefor contributed to the catastrophe and imposed manifold duties on the Master beyond his capacity to perform. Had such findings and conclusions been made, fault inevitably would have been assigned directly to the Owners and Operators. The Court therefore failed to make critical findings and conclusions with respect to fault on the part of Owners and Operators, and the extent to which same contributed to the catastrophe. It is therefore suggested that the conclusion of 50% fault each on the part of Weldon and Verret is based on incomplete findings of fact and conclusions of law.

VII. The Court of Appeals

On appeal the Court of Appeal, Fifth Circuit:[15]

(1) Reversed the District Court's decision dismissing the limitation proceedings for failure to comply with the requirements of 46 U.S.C. 185 and Admiralty Rule 51;

(2) Affirmed the District Court in its ruling on limitation, stating

> "Accepting as we must, since they were based on substantial evidence, the Trial Court's findings that the vessel was in no way unseaworthy, we affirm that part of the Court's decision which found that the right to limitation had been established . . ."

despite the fact that the District Court had made absolutely no findings or conclusions with respect to lookouts or undercrewing of the vessel.

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[15] See Opinion, *infra* Appendix B, p. 59 *seq.*

(3) Failed to rule at all on the issue of fault and the holding of Weldon and Verret each fifty per cent (50%) negligent.

G.

JURISDICTION OF DISTRICT COURT

The District Court had jurisdiction generally of the subject matter of this cause under United States Constitution Article III, Section 2; but lacked jurisdiction of this particular proceedings for the reasons herein set forth.

H.

ARGUMENT

I. The Motion to Dismiss Both Petitions was Properly Granted

It is doubtful whether judicial annals will disclose as flagrant a violation and disregard of all laws and of all Supreme Court Rules with respect to limitation of liability proceedings as exists in this case.

Mr. Lamar Jones, Marine Superintendent of Oil Transport Co., Inc., charterer and operator of the towboat and barges, testified he was fully aware of all of the wreckage, strippings, proceeds and values remaining after the catastrophe referred to in Article 11,[1] yet he executed the false affidavits attached to the petitions for limitation[2] reciting that

"neither the vessel, nor its wreckage, strippings

[1]Testimony, Jones, R. p. 1097, 1099-1103, 1110-1113, 1159. As to the tort claim against the bridge owner, see Petition, Article 22, R. p. 9.
[2]See Affidavits, Jones, R. pp. 21, 74; Beattie, R. pp. 20, 72.

> or proceeds, had any value whatever when said vessel was sunk on May 19, 1950, nor have they any value today."

No *ad interim* stipulation, even for costs, was filed with the petitions for limitation, or prior to the issuance of the monitions,[3] nor were any stipulations ever filed until November 19, 1951.[4] Seventeen (17) months prior thereto, on June 24, 1950, Lennis Verret had filed his written claim against Oil Transport,[5] and nine (9) months prior thereto, on June 23, 1951, Mrs. Cushing had filed her written claim against Charles C. Smith Co.[6]

Thus the proceedings is based on false affidavits as to no value, found to be false by the trial court,[7] and known to be false when made. While the "vessel" involved in this case was both in law[8] and in fact[9] tug and tow as a single integrated unit, petitioners sought limitation only as to the worthless part thereof—the JANE SMITH—while at the same time claiming the protection and benefits of limitation as to the valuable oil barges and other parts. They callously allowed their tort claim to prescribe. No surrender of the vessel or any *res* was made to a trustee; no stipulation, *ad interim* or otherwise, was filed; no surety was furnished within 6 months of a claim.

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[3]R. pp. 23, 76.
[4]R. pp. 110, 114.
[5]Claim, R. p. 26.
[6]Admission, Smith Petition, Article 26, R. p. 62.
[7]R. p. 1195.
[8]*Sacramento Navigation Co. v. Salz*, 273 U.S. 326; *Standard Dredging Co. v. Kristiansen*, (2d Cir.) 67 F.2d 548, cert. den., 290 U.S. 704; *Short v. The Columbia*, (9th) 73 F. 226; *The Clevaco*, 59 F. Supp. 71; *The Big Chief*, 75 F. Supp. 496; *Sabine Towing Co. v. Brennan*, 72 F.2d 490, cert. den., 293 U.S. 611.
[9]All of petitioners' experts, and their marine superintendent, testified that tug and tow were made up into a single-unit integrated tow. See Briet, R. p. 959; Testimony, Grant, R. p. 1011; Testimony, Jones, R. pp. 1145-1146; see also Opinion, R. p. 1195.

Under such circumstances, all the District Court had before it were the pieces of paper the petitions for limitation were written on — and those were false!

a.

There Can be no Limitation Without Compliance With Statute and a Res

A petitioner for limitation must, in addition to the mere filing of a petition, comply with the mandatory requirements of the limitation statute, as amended in 1936, and vest the Admiralty Court with jurisdiction over a *res*, either in the form of surrender of the vessel to the Court through a trustee appointed to receive it, or by filing an *ad interim* stipulation, to take the place of the *res*. Otherwise there is nothing to which the jurisdiction of the Court can attach.

As early as 1871, in *Norwich Co. v. Wright*,[10] the Supreme Court set out the proper procedure to invoke the court's jurisdiction, saying:[11]

> "It is to be observed, however, that if the ship owner desires the intervention of the court, it will not be sufficient for him to ask simply for a pro-rata reduction of the libelants' damages, without in some manner tendering the corresponding pro-rata compensation to which other parties, whose claims he sets up against the libelants, are entitled. . . . But in order to proceed regularly, the court must have possession of the limited liability fund —that is, the proceeds or value of the ship and

[10] 80 U.S. 104, 13 Wall. 104, 20 L.Ed. 585.
[11] At page 124.

freight. It cannot distribute a fund of which it has not the possession."

The theory of limitation being a concursus proceeding for the distribution of a fund was recently reaffirmed by the Supreme Court in *Maryland Casualty Co. v. Cushing.*[12] The observation made by the Supreme Court in *Norwich* were subsequently expressly adopted both by Statute and by the Supreme Court rules.

The Statute is explicit on the subject. It provides as follows:[13]

". . . and the owner (a) *shall* deposit with the court for the benefit of claimants a sum equal to the amount or value of the interest of such owner in the vessel and freight or approved security therefor, and in addition such sums or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of this title or (b) at his option *shall* transfer for the benefit of claimants to a trustee to be appointed by the court his interest in the vessel and freight together with such sums or approved security therefor, as the court may from time to time fix . . . *upon compliance with the requirements of this Section, all claims and proceedings against the owner with respect to the matter in question shall cease.*" (Emphasis added)

Rule 51 of the United States Supreme Court Admiralty Rules is even clearer and more detailed than the Statute. It provides as follows:

"The owner or owners of any vessel who desire to

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[12]347 U.S. 409.
[13]R.S. Sec. 4285, 46 U.S.C. 185.

> claim the benefit of limitation of liability . . . may file a petition in the proper district court . . . With his petition, the petitioner may, if he so elects file an interim stipulation, with sufficient securities or an approved corporation surety for the payment into court, whenever the court shall so order of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage, or in case of wreckage, the value of the wreckage, strippings or proceeds . . . with interest at 6% per annum from the date of stipulation and costs . . . or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight, to a trustee to be appointed by the court under the 4th Section of said Act . . .
>
> Upon the filing of such interim stipulation . . . or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims, etc. . . .

In commenting upon this Rule, Benedict in his work on Admiralty has said:[14]

> "The provisions of General Admiralty Rule 51 indicate that the appraised value is to be paid into court or secured, or the property transferred to the Trustee before the court shall issue its monition to all persons claiming damages."[15]

All of the authorities concur in the view that there is no jurisdiction in the court unless and until the court is

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[14]Vol. 3, p. 527.
[15]Citing *Ex parte Slayton* (1880), 105 S.Ct. 451, 26 L.Ed. 1065.

furnished with a *res* to which its jurisdiction can attach, either by the furnishing of a stipulation or the transfer of the vessel to a trustee appointed by the court. Thus, Benedict[16] says:

> "The shipowner-petitioner, by giving the stipulation, making the deposit, or transferring ship and freight to a trustee, gives the court jurisdiction of the property or fund."

b.

Errors of Court of Appeals

The Court of Appeal in this case seems completely to have misconceived the nature and purpose of a statutory limitation of liability proceeding. Instead of looking on it as a concursus for the distribution of a fund — the *res* — as explained in *Norwich* and *Cushing*, the Court of Appeal conceived of it, and treated it, as a mere declaratory judgment proceeding, which it emphatically is not! It fell into that error initially in the very first paragraph of its opinion by failing to understand the two methods by which limitation may be pleaded — i.e., either defensively under Section 183(a),[17] or by provoking a concursus under Section 185.[18]

The Court of Appeal seems erroneously to have assumed this to be a proceeding under Section 183(a), and later on in its opinion treats Section 185 of the Limitation Statute simply as the "procedural requirements" for invoking the protection of 183, which may be relaxed by

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[16]Vol. 3, p. 343.
[17]46 U.S.C. 183(a). See also *Benedict*, ON ADMIRALTY, Vol. 3, p. 463.
[18]46 U.S.C. 185. See also *Benedict*, ON ADMIRALTY, Vol. 3, p. 346.

the court to achieve the substance of the limitation established in 183. But this is not a defensive proceeding under Section 183; it is a concursus provokable only in accordance with Section 185.

The Court of Appeal completely failed to take into account that a Section 185 limitation proceeding is strictly statutory and *sui generis* in it nature. It depends entirely on being brought in accordance with the terms of the statute. The 1936 amendments to Section 185[19] deliberately established the requirements of such proceedings therein set forth as mandatory, both as to the furnishing of an *ad interim* stipulation with proper sureties for whatever values the Court may subsequently find to exist, and for filing of same within 6 months of claim. While the court may have had some discretion in applying the rules prior to 1936, they certainly have none thereafter, in view of the mandatory language of Congress.[20]

The Court of Appeal similarly misconstrued the purpose of the six months peremption on limitation proceedings after the filing of a claim. It was the deliberate purpose of Congress, in the 1936 amendments, to change the procedure in Section 185 and make the revival of limitation proceeding after six months impossible, in order to protect claimants against delay. Thus, in permitting a stipulation to be filed more than 6 months after written notice of claims, the Court of Appeals has defeated a principal purpose of Congress in the 1936 Amendments to

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[19]49 Stat. 1479.

[20]See *Gilmore & Black*, THE LAW OF ADMIRALTY, pp. 683-4. See also *American Tobacco Co. v. The Katingo Hadjipatera*, 211 F.2d 666, cert. den., 348 U.S. 828.

Section 185, and has gone directly contrary to the decision of this Honorable Court in *Black Diamond SS Corp. v. Robert Stewart & Sons*,[21] where this court held:

> "... in view of the six months limitation on proceedings under that statute ... dismissal of the petition ... could only have had the effect of depriving the petitioner altogether of the privilege of a limitation proceedings, no matter what the amount of the bond they were willing to post."

Again, the Court of Appeal completely misunderstood this Court's decision in *Black Diamond*. There the only thing that saved the limitation proceedings from dismissal was the existence of an *insufficient* bond. The *res* was before the court, albeit not large enough, and jurisdiction therefore attached, along with authority in the Court to increase the amount of the bond under the express terms of the *ad interim* stipulation. But it is clear from the decision in *Black Diamond* that had there been no stipulation at all, as in the instant case, then the limitation proceeding would have been dismissed for lack of a *res*, and non-compliance with the mandatory provisions of the statute. Indeed, limitation was saved as to the United States in *Black Diamond* only because of the specific provision in the Suits in Admiralty Act exempting the United States from furnishing bond in admiralty matters.

Thus, contrary to the opinion of the Court of Appeal, the deficiencies of the proceedings in this case, and the failures to comply with the requirements here, are even more glaring than in *Petition of Goulandris*,[22] where limita-

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[21] 336 U.S. 389.
[22] 140 F.2d 780.

tion was denied for non-compliance with the requirements of 46 U.S.C. 185 and the failure to furnish a *res*. To hold, as the Appeals Court did here,[23] that the mere tender of a worthless vessel without the substantial values going along with it, and the mere unsecured tender of a stipulation, is equivalent to the actual surrender of the vessel and all its values to a trustee, and to the furnishing of a secured stipulation required by 46 U.S.C. 185, is simply to do violence to the statute, achieve results Congress intended to prohibit, and deprive claimants of the security Congress intended for them to have within 6 months of the filing of a claim. Neither good nor bad faith has anything to do with it.

The Court of Appeals further erred in its assessment of the values to be surrendered or stipulated for. It has created a confusion between this Court's decisions, in *Sacramento Navigation Co. v. Salz*[24] and *Liverpool, Brazil & River Plate Steam Nevigation Co. v. Brooklyn Eastern District Terminal*,[25] where none actually exists.[26] The distinction between the two lies, as aptly pointed out by Judge Learned Hand in *In re United States Dredging Co.*,[27] in whether the claimant has a contractual relationship to the flotilla as a whole or is a stranger thereto. If a stranger, then *Brooklyn Terminal* applies, and only the damage feasant tug is liable; but where a contractural relationship of employment with respect to the whole flotilla exists, as in this case, particularly where an integrated tow is involved and all elements are owned by, and chartered to, petitioners in limitation, there is no question but that *Salz*

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[23]Opinion, *infra* p. 67.
[24]273 U.S. 48.
[25]251 U.S. 48.
[26]See Opinion, Court of Appeals, *infra* p. 66.
[27]264 F.2d 339.

applies, and the whole flotilla is liable and subject to surrender in the limitation fund.[28]

Similarly with respect to the prescribed tort claim — the court had already held such a claim must be surrendered in a limitation proceedings, or stipulated for,[29] and its apparent holding that such a result can be evaded by the simple expedient of allowing such a claim to prescribe is curious to say the least, and devistating on the amount of the limitation fund to which claimants may look for their recovery.

Of course, after prescription, it is impossible to prove that a valid tort claim existed — no court can try it, no jury can pass on it, and no decision of its validity can be made. But that such a *claim* — valid or not — existed is clear from petitioners' own description of the cause of the catastrophe,[30] and such *claim*, valid or not, is required to be surrendered or stipulated for.[31] The penalty for doing neither — but permitting it to be lost — should be either assessing it at full value, as the District Court attempted to do, or dismissal of limitation for failure to comply with statutory requirements.

Finally, the Court of Appeals' excusing of the failure to stipulate for the $100.00 value of the lifeboat because it was "nominal,"[32] flies directly in the face of Admiralty

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[28]See *Standard Dredging Co. v. Kristiansen*, *supra* note 8; *Short v. The Columbia*, *supra* note 8; and other cases cited *supra* note 8.

[29]See *Geotechnical Corp. v. Pure Oil Co.*, 196 F.2d 199.

[30]See Petition for Limitation, Article 22, R. p. 9.

[31]See *Petition of Navigazionie Libera Triestina*, 34 F.2d 150; *The Cayuga*, 81 U.S. 270. See also *The Captain Jack*, 169 F. 455; *O'Brien v. Miller*, 168 U.S. 287.

[32]Opinion, *infra* p. 66.

Rule 51, which specifically requires a stipulation for "strippings." The word in itself refers to nominal values!

c.

Conclusion re Motion to Dismiss

It is therefor respectfully submitted that the decision of the Court of Appeals, Fifth Circuit, reversing the District Court's dismissal of this proceeding, is wrong, at variance with the Act of Congress and the decisions of this Honorable Court and of the courts in other Circuits, and decides important questions of national and international significance in the interpretation and administration of the Limitation of Shipowners Liability Act in conflict with applicable decisions of this Honorable Court.

II. As to Lookouts

As pointed out above, neither court below made any findings of fact or conclusions with respect to lookouts; and the effect, both on petitioners' right to limit, and on their fault, resulting from the glaring difficiencies of the JANE SMITH integrated tow structurally, as to personnel and crew, and operationally.

a. Facts re Lookouts

1. No Lookouts Provided

With the full knowledge, consent, and approval of Oil Transport, the JANE SMITH tow customarily operated in the heavily-trafficked, narrow waters of the Mississippi and Atchafalaya Rivers, and navigated the narrow draw-

bridges and passages thereof, without benefit or protection of any lookouts whatsoever. Lamar Jones, Marine Superintendent of Oil Transport testified:

> Q. Did you instruct your pilots that they should have lookouts on the bow of the first barge at at all times?
>
> A. No, sir, I did not.
>
> Q. Did you instruct them that they should have lookouts there at night?
>
> A. No, sir, I did not.[33]
>
> Q. Now, you knew that it wasn't the custom to post a lookout on regular watch on the Jane Smith, didn't you?
>
> A. On a clear night, that is not required on any of our vessels . . .
>
> Q. And you fully condone that practice?
>
> A. Yes, I do . . .[34]

Indeed, Oil Transport furnished the Master with an insufficient crew to post lookouts! The deck department consisted of only two (2) deckhands, Ashely and Odom, besides the Mate,[35] only one of whom was on duty at one time,[36] and each of whom had to serve a 12-hour shift each day composed of two 6-hour watches.[37] The surviving deckhand's testimony of his duties with respect to lookout is

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[33]R. p. 1129.
[34]R. p. 1131.
[35]R. pp. 1095-1096; 1038; 1129.
[36]R. p. 1129.
[37]R. p. 1129.

most revealing as to the management and operation of the vessel; and establishes that he did not even know what a lookout was:

"Q. Do you know what a lookout is?

A. Checking everything, keep it up.

Q. No, I am not talking about that sort of lookout; I am talking about a lookout whose duty is solely to look out for other vessels, to look out for bridges, to look out for structures?

A. That's the Captain's Department.

Q. That is the Captain's Department?

A. Yes sir.

Q. The Jane Smith never carried a lookout stationed on the prow of the forward barge?

A. No, sir.

Q. You never stood any watch?

A. No, sir.

Q. Nobody was standing any such watch at the time of this collision, were there?

A. Not as I know of."[38]

More than that, the deckhand furnished by Oil Transport who was on duty at the time of the catastrophe — and

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[38]R. pp. 1039-1040.

hence the only one available to serve lookout duty — was color-blind,[39] and being useless as a lookout, was getting coffee for the Master at the time of the disaster.[40]

2. *No Facilities Provided for Lookouts*

Even had the crew been sufficient, the posting of lookouts would have been both impossible and useless. No facilities were provided on the prow of the lead barge for lookouts,[41] and as a barge has no rails, special facilities are necessary to provide a safe place for a lookout to work without being in danger of falling overboard. Marine Superintendent Jones admitted:

> Q. Now, you have no place of shelter on the . . . bow of the front barge, to shelter a lookout if it should be raining or cold or inclement weather?
>
> A. Certainly not, sir . . .[42]
>
> Q. Did you ever have any arrangements for telephone system or intercommunication system or squak boxes, as commonly called, from the prow of the first barge to the pilothouse, so that the pilot and the lookout could be in communication?
>
> A. No, sir . . .[43]

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[39] Admission of Deckhand Odom, R. p. 1045.
[40] R. pp. 1046, 1048-1049.
[41] Testimony, Odom, R. p. 1040.
[42] R. p. 1131. It is, of course, common practice, where the rail of a ship does not itself afford shelter to a lookout, to stretch a canvas to afford some protection from wind and other elements. A barge has no rail, so if a lookout is to be used at all, some sort of protection and shelter must be provided.
[43] R. p. 1129.

When it is remembered that the prow of the lead barge of this integrated tow was at least 500' from the wheelhouse — a distance probably greater than from bow to wheelhouse on the SS QUEEN ELIZABETH — it is seen that the maintenance not only of a "proper lookout," but of a communications system between lookout and wheelhouse was imperative! Yet it is notable that while the owners and charterers of the JANE SMITH failed and neglected to provide the *necessity* of a telephone system for the use of lookouts, they did provide the *luxury* of a telephone system between the galley and the wheelhouse, and a telephone system between the wheelhouse and the engine room.[44] They are not, therefore, in a position to say that such telephone system was impractical!

b. Law of Lookouts

Perhaps one of the most elementary rules of marine safety in navigation is the importance of keeping and maintaining a proper lookout, particularly when under way, at night, and in treacherous waters. The courts, understanding the importance of lookouts and realizing the wanton recklessness of operating without them, have been zealous in enforcing the obligation of providing not only a lookout — but a *proper lookout*. The United States Supreme Court listed some of the essential characteristics of a "proper lookout" in the early case of *The Ottawa*,[45] which have been adhered to, refined, and elaborated on, ever since, viz:

> "Steamers are required to have constant and vigilant lookouts stationed in proper places on the

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[44]Testimony, Chief Engineer Koch, R. p. 1017.
[45]3 Wall. 268.

vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel and actually and vigilantly employed in the performance of that duty. . . . Proper lookouts are competent persons other than the Master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed is not the proper place . . . And in general, elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward part of the vessel, nearer the stem. . . . Persons stationed on the forward deck are nearer the water line, and consequently are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement."

With respect to the necessity for a proper lookout in river navigation on a dark night, the Supreme Court said in *The Oregon*:[46]

"The weather was calm, and the sky somewhat cloudy, but the night was dark and clear—such a night as is most favorable for discovery of lights. The deck watch was composed of the river pilot in command (who was on the bridge just above the pilot house), a man at the wheel, and a lookout upon the forecastle head . . .

Considering the darkness of the night, . . . the narrowness of the channel, and the probability of

[46]158 U.S. 186.

> meeting other vessels, the greatest watchfullness was required, and we think that prudence required at least an additional lookout. *The watch was the smallest that would be tolerated under any circumstances*, and even were it sufficient for navigation by daylight, *it by no means follows that it was sufficient for running a river in a dark night.*" (Emphasis added)

Indeed in river and narrow channel navigation the courts usually require not one, but two lookouts forward at the extreme bow,[47] and for this purpose even the English Channel is considered a "narrow channel"![48]

The Western River Rules,[49] governing navigation of the Atchafalaya River and the Mississippi River above the Huey P. Long Bridge — the exact waters in which the JANE SMITH integrated tow was operating, specifically provides in Rule 26:[50]

> "Nothing in sections 302-352 of this title shall exonerate any vessel, or the owner . . . thereof, from the consequences . . . of any neglect to keep a proper lookout. . ."

The law of lookouts is the same with respect to tows, as with respect to any other vessel.[51]

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[47]See *The Oregon*, *supra* note 46; *The Ogdensburgh*, 21 How. 548.
[48]*The Germania*, 3 Mart. Law Cases, O.S. 269.
[49]33U.S.C.A., 301 *seq.*
[50]33 U.S.C. 351.
[51]*G. B. Zigler Co. v. Barker Barge Line*, (C.C.A. 5th) 167 F.2d 676; *The Big Chief*, 75 F. Supp. 496; *Pure Oil Co. v. M/V Pennsylvania*, 124 F. Supp. 121; *Lea River Lines v. The Virginia*, 85 F. Supp. 89; *The Northland*, 125 F. 58. See also *Robinson*, HANDBOOK OF ADMIRALTY LAW, p. 813; *Knight's* MODERN SEAMANSHIP, 10th Ed., p. 347; *Gilmore & Black*, THE LAW OF ADMIRALTY, pp. 404-405.

c. Failure to Provide For Lookouts As It Affects Right to Limit Liability

There can be no question but that the foregoing glaring deficiencies in crew, in furnishing a color-blind lookout, in vessel structure by failing to provide a safe place for lookouts to work; and in failing to provide a communications system between lookout-station and wheelhouse, constitute unseaworthiness of the integrated tow to which Oil Transport was admittedly privity and had full knowledge of all things. The Smith Co. had equally privity to the vessel's structural deficiencies and shortcomings. Such privity and knowledge of a condition of unseaworthiness deprives an owner or charterer of the privilege of limitation.[52]

A case closely in point is *The T. J. Hooper*.[53] There the owners failed to equip a coastwise tug with a proper radio communications system to receive storm warnings. The vessel was declared unseaworthy for the lack thereof, and limitation denied. It is respectfully submitted that the deficiencies here are even more glaring than in *The T. J. Hooper*.

It cannot be gainsaid that the failure to provide proper facilities for, and sufficient crew and instructions requiring, a proper lookout on duty at all times, was at the very least a contributing cause of this casualty. A proper lookout, alert to his duties, in the eyes of the integrated tow as it were, 500′ nearer to the bridge than the helmsman,

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[52] *The North Star and Ella Worley*, 106 U.S. 17; *The Miami*, 43 F.2d 562; *Braker v. Jarvis Co.*, 166 F. 987; *The Llewellyn J. Morse*, 25 F.2d 973; *The Big Chief*, *supra* note 51.

[53] 60 F.2d 737, cert. den., 287 U.S. 662. See also *The Arabic*, 50 F.2d 96; *Northern Petroleum Tank Steam Co. v. City of New York*, 181 F. Supp. 192.

would have been bound to have discovered the mis-alignment of the unit. And given adequate means of communication, he would unquestionably have warned those in the wheelhouse of the mis-alignment in ample time for the tow to have backed away again and maneuvered into proper position.

Indeed, under the circumstances it is difficult to see how the JANE SMITH integrated tow could be expected to negotiate the narrow draw-bridges in the swift and treacherous currents of the Atchafalaya River at night without the required two lookouts! The draw span was only 110′ wide,[54] and the barges to be threaded through the draw guided from the pilothouse 500′ away were themselves 50′ in width, thus leaving an average of only 30′ clearance on each side at best! And this had to be accomplished in the notoriously treacherous waters of the Atchafalaya River in what petitioners themselves described as:

> "the surging eddies and currents[55] . . . eddies in the current of the river which was very swift, strong and irregular[56] . . . the current . . . was extremely swift, strong and irregular in the vicinity of the . . . Bridge . . . being in excess of six miles per hour and containing strong eddies."[57]

It is thus seen that facilities and crew for adequate and proper lookouts was essential to the navigation of this vessel, and the failure to provide same was a direct cause of the catastrophe. In the quite similar case of *Martin Marine Transportation Co. v. U.S.*,[58] failure to provide for

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[54]R. p. 6.
[55]Petition for Limitation, paragraph 18, R. p. 7.
[56]*Id.*, paragraph 16, R. p. 7.
[57]*Id.*, paragraph 11, R. p. 5.
[58]183 F.2d 676.

adequate lookouts was held cause for denial of limitation under circumstances quite similar to these. Moreover, *The Pennsylvania* Rule[59] of presumption of fault on a showing of a violation of the Rules of Navigation should apply as well in denying limitation to the owners and operators furnishing an unseaworthy vessel in violation of the Rules, as in establishing fault.[60]

d. Failure to Provide for Lookouts As It Affects Fault

It is respectfully submitted that just as the lookout deficiencies of the JANE SMITH tow should deprive petitioners of their right to limit liability, so also should such deficiencies, created and permitted by them to exist, convict them of fault in the catastrophe. Neither of the elements of fault found by the District Court, i.e., (1) drifting down too close on the bridge; and (2) attempting to run the draw while misaligned, would have occurred had the JANE SMITH been properly furnished with facilities for lookouts, and an adequate crew to assign lookouts. Given proper lookouts, a place to station them on the bow of the lead barge, and adequate means of communication with the wheelhouse, the JANE SMITH would never have gotten so badly out of line — or if she had become misaligned, the lookouts would have warned the Master, and he would have backed up again.

Whose fault was it that proper lookouts were not aboard the JANE SMITH? Certainly not Captain Weldon's — he couldn't possibly post lookouts for lack of sufficient

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[59] *The Pennsylvania*, 86 U.S. 125.

[60] See *Afran Transport Co. v. The Bergechief*, 170 F. Supp. 893, aff'd, 274 F.2d 469; *Pacific Towboat Co. v. State Marine Corp.*, 276 F.2d 745. See also authorities cited note 51 *supra*.

personnel! The Master, Weldon, was thus required to do without benefit of a lookout, without the benefit of information as to position, location, conditions, proximity, and other information which should have been available from two lookouts 500′ ahead. And as the JANE SMITH was pilothouse controlled,[61] he was required by the owners and charterers not only to act as his own lookout from 500′ away from where two lookouts should have been, but also to act as his own helmsman, maneuver the searchlights, give and answer signals, handle the throttle, operate the clutch from forward to reverse, estimate time, distance, speed, angle of approach, and navigate a 580′ single-unit integrated tow in the "surging eddies and currents . . . of the river which was . . . extremely swift, strong and irregular in the vicinity of the Bridge" so as to thread a unit 580′ long and 50′ wide through a 110′ span at or near a curve in the river — and this in 12-hour shifts per day, 6 on and 6 off!!![62] He was literally expected to be busier than the proverbial one-armed paperhanger!

To charge Weldon and Verret with negligence because they did the best they could under the impossible conditions imposed on them by the vessel owners, who furnished no facilities for lookouts, and the operators, who furnished insufficient crew, would be charging them for faults they did not commit, and over which they had no control.

The power and authority properly to man and equip the JANE SMITH with lookouts lay with her owners and operators—not with these employees. The employees should not be charged with the consequences of the failure of

[61]Testimony, Koch, R. p. 329.

[62]Oil Transport vessels normally carried two "captains" who alternated six-hour shifts.

owners and operators to furnish necessary men, and a proper place in which to work. It is therefore respectfully submitted that Weldon and Verret should be absolved of any fault in this connection, and the responsibility be placed where it properly belongs: in the hands of the owners of the vessel, Charles C. Smith Co. and her charterers and operators, Oil Transport Co., Inc.

e. Effect of Failure of Lower Court to Find Facts and Conclude Law re Lookouts

Admiralty Rule 46½ requires the court of first instance to "find the facts specially and state separately its conclusions thereon." While the above issues were properly raised, both in the District Court,[63] and on appeal, neither court adverted to the lookout situation in its Opinion, and no separate findings and conclusions were filed by the District Court.

It is respectfully submitted that had the courts below properly considered the lookout situation and made proper findings on the undisputed facts and conclusions of law based thereon, their decisions must have resulted in a denial of limitation and a finding of fault on the part of Oil Transport and Smith Company. Any other findings would have been contrary to the admitted facts with respect to absence of facilities and crew for lookouts; any other conclusions would have been contrary to the law of lookouts.

There is no reason here for a remand of the case to the District Court for findings and conclusions on lookouts, because the facts are not in dispute — indeed, are admitted —

[63]See for example, Answer of Cushing, R. pp. 122-125. All answers are substantially the same.

and the law is clear. This, in itself, is sufficient to justify an appellate court in deciding in the absence of findings and conclusions below.[64] Additionally, this Court may exercise its *de novo* jurisdiction in admiralty to make the necessary decision on this issue.[65] It is respectfully requested that this Honorable Court exercise such jurisdiction in view of the fact that this case has already been pending ten years.

In all events, the failure and refusal of the lower courts to pass on the issue of lookouts, and to make findings and conclusions with respect thereto, in violation of Admiralty Rule 46½, constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

I.

CONCLUSION

It is believed that important questions of national and international significance in the administration and application of the Limitation of Shipowners' Liability Law of the United States, and of the jurisdiction of the courts with respect thereto, are raised by the decisions of the District Court and the Court of Appeal, Fifth Circuit, in this case, and by this application for certiorari. It is suggested that the Court of Appeal, in the particulars above set forth, has decided questions of general importance relating to the construction and application of the Limitation of Shipowners' Liability Act without giving proper effect;

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[64] *Burns Bros. v. The Systematic*, 99 F. Supp. 870.
[65] See *Langnes v. Green*, 282 U.S. 531.

and indeed, at variance with decisions of this Court and the plain language of the statute itself.

Your petitioners suggest in conclusion the following reasons why this Honorable Court should grant the prayer of this petition:

1. The correct procedure to be followed, the elements of values to be surrendered, and the prompt furnishing of adequate and viable security for such values going to make up the limitation fund is of the utmost importance in the protection of claimants in limitation of liability proceedings, and to the entire shipping industry, both domestic and foreign, who are entitled to its advantages. Limitation of liability is a drastic remedy cutting across and reducing, in many instances to practically nothing, injury and damage claims against shipowners and operators. Both Congress, in 46 U.S.C. 185, and this Honorable Court, in Admiralty Rule 51, have sought to protect whatever little was left for claimants by requiring petitioners for limitation to provide, *at the very inception of the proceedings*, and at the very latest within (6) months of a written claim, security for such claimants in the form either of actual surrender into Court of the limitation funds —including all of the shipowner's rights—or an *ad interim* stipulation with adequate sureties "for the payment into court whenever the court shall so order, of the . . . value of petitioner's interest . . . and costs."

The decision of the Court of Appeals in this

case defeats the entire purpose of the Congress, and of Admiralty Rule 51, in these important respects. It permits a mere unsecured "offer" to give a stipulation at a later date to substitute for the required *secured* stipulation. It permits a delay of seventeen (17) months in furnishing the secured stipulation required by law and the Rules, whereas 46 U.S.C. 185 permits only six (6) months for the furnishing thereof. It furthermore misinterprets and misconstrues the statutory and Rules requirement of a "stipulation" to mean that it should be for a sum certain in money, which the Court of Appeals assumed in this case "would be zero," while the Statute and Rule specifically require the stipulation to be, not for a sum certain, but indeterminate in amount to cover:

> "in addition such sums, or approved security therefor, as the court may from time to time fix as necessary. . . ." (46 U.S.C. 185)

2. To the extent that the Court of Appeals has held that the furnishing of a stipulation with security is not jurisdictional, the decision is in conflict with *Norwich Co. v. Wright*, 80 U.S. 104, and the decisions mentioned above, and turns a limitation of liability proceedings, which this Court has described in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, as a "concursus," into a mere declaratory judgment proceedings!

3. The decision is in conflict with the following decisions of the Second and other Circuits dismissing

limitation proceedings filed without compliance with the requirements of the statute and rules:

Petition of Goulandris, 140 F(2d) 780, *cert. den.* 322 U.S. 755.

The Boyle #1, 64 F. Supp. 378.

The Chickie, 141 F(2d) 80.

Wong v. Utah Home Fire Ins. Co., 167 F. Supp. 230.

4. The decision is in conflict with the express language and at least implicit holding of the Supreme Court in *Black Diamond SS Corp. vs. Robert Stewart & Sons*, 336 U.S. 389, that while the filing of an *insufficient* stipulation does not defeat a limitation proceedings, the failure to file any stipulation at all as required by statute and the Rules within six (6) months of written demand defeats same "no matter what the amount of the bond they were willing to post." (at p. 395).

5. With respect to the composition of the limitation fund and the values to be surrendered therein or stipulated and secured for, certainly the doubt raised by the Court of Appeal as to the need for surrendering the barge portion of the integrated tow is unjustified in view of the decisions of this Court in *Sacramento Navigation Co. v. Salz*, 273 U.S. 326. See also *Standard Dredging Co. v. Kristiansen*, 67 F(2d) 548, cert. den. 290 U.S. 704. The distinction between these cases and the earlier *Liverpool, etc., Navigation Co. v. Brooklyn Ter-*

minal Co., 251 U.S. 48, is ably drawn by Judge Hand of the Second Circuit in *In re United States Dredging Corp.*, 264 F(2d) 339, as requiring only the surrender of the damage feasant vessel where a stranger is damaged, but of the entire flotilla where the owner had assumed toward the claimant a contractual relation, such as employment, in connection with the whole flotilla.

Similarly, with respect to the surrender of the lost tort claim against the railroad, it can hardly be held, as intimated by the Court of Appeal, that no value can be assigned to it until it is tried and determined. Petitioners themselves made that impossible by permitting it to prescribe, and should suffer the consequences. The very doubt created in this case as to the composition, elements, values and time of surrender or stipulation for the limitation fund requires authoritative clarification.

6. Indeed, the very controversy between the District Court and the Appellate Court in this case as to the items to be surrendered and the values to be assigned thereto —and the loss of the tort claim against the Railroad by prescription — emphasizes the necessity for compliance in surrendering first —and at the latest, within six (6) months of a claim — under a stipulation with security for an indeterminate amount for "such sums . . . as the court may from time to time fix as necessary." (46 U.S.C. 185 and Admiralty Rule 51)

7. Insofar as both the District Court and the Court of Appeals failed to make any findings or conclu-

sions with respect to owner's and operator's culpability re lookouts, and the providing of proper facilities therefor, and the effect thereof on liability and the right to limit, Rule 46½ of the Admiralty Rules of this Honorable Court was violated. This Court has been particularly zealous, in the interest of marine safety and in the protection of lives and property, in insisting on the maintenance at all times of a "proper lookout."

The Ottawa, 3 Wall. 268.

The Oregon, 158 U.S. 186.

The Western River Rules (33 U.S.C. 301. *seq.*), which are applicable to the waters in question, codify the Court's interpretation of a "proper lookout." The misalignment occurred while no lookout was on duty — a practice admittedly condoned and approved by the operators of the vessel, who furnished neither sufficient crew nor facilities to maintain a "proper lookout," and had no facilities for a proper lookout 500′ from the wheelhouse to communicate with the bridge of the vessel.

Ordinarily perhaps this Court would remand for proper findings on the subject of lookouts; but since the facts with respect thereto are admitted and are not in dispute, and since the failure to provide and operate with "proper lookouts" while under way is an obvious violation of the Western River Rules, and since it can hardly be gainsaid that "proper lookouts" 500′ closer to the draw span would have observed the misalignment of the vessel

and communicated same to the bridge in time to avoid the disaster, it is respectfully suggested that this Court should exercise its *de novo* jurisdiction with respect to lookouts under the circumstances and itself decide this aspect of the case without remand.

Langnes v. Green, 282 U.S. 531.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue directed to the United States Court of Appeals for the Fifth Circuit commanding that court to certify and to send to this court a full and complete transcript of the record of all proceedings of said court in the above-entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioners will ever pray.

JAMES J. MORRISON,
1007 National Bank of
Commerce Building
New Orleans 12, Louisiana
Proctor for Petitioners.

Of Counsel:
Arthur A. de la Houssaye
Raymond H. Kierr
Browne & Rault
New Orleans, Louisiana
Gloria N. Irvine
On the Brief.

STATE OF LOUISIANA
EASTERN DISTRICT OF LOUISIANA } ss.:
PARISH OF ORLEANS

JAMES J. MORRISON, being duly sworn, says that he is Proctor for petitioners herein; that he has prepared and read said petition subscribed by him, and that the facts therein stated are true and correct to the best of his knowledge, information and belief.

.....
JAMES J. MORRISON

Sworn to and subscribed before me

this ..... day of August, 1960.

.....
Notary Public
My commission is granted for life.

I HEREBY CERTIFY that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioners should be granted by this Honorable Court.

.....
JAMES J. MORRISON,
Proctor for Petitioners

APPENDIX A

District Court Opinion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

In Re: OIL TRANSPORT COMPANY, INCORPORATED,
Petitioning for Exoneration from, and Limitation of, Liability
NO. 508 ADMIRALTY

In Re: CHARLES C. SMITH COMPANY,
Petitioning for Exoneration from, and Limitation of, Liability
NO. 512 ADMIRALTY

Deutsch, Kerrigan & Stiles
Paul A. Gaudet
William S. Stone

Proctors for Petitioners

James J. Morrison
Raymond H. Kierr
Arthur A. de la Houssaye
Brown & Rault
Gerard Rault
Mandell & Wright
Herman Wright

Proctors for Claimants

WRIGHT, District Judge:

On May 19, 1950, at approximately 9:30 P.M., the towboat JANE SMITH[1] capsized, floundered and sank in the Atchafalaya River after striking a railroad bridge at Melville, Louisiana. This litigation concerns limitation of liability proceedings filed by her bareboat charterers[2] and her owner, together with the claims of representatives of members of the crew who lost their lives in the casualty: There is an additional claim by one survivor.

On the morning of May 19, 1950, the JANE SMITH, with two empty oil barges[3] in tow, docked at Simmesport, Louisiana, to effect minor engine repairs and to pick up a pilot, Captain Verret, to assist in the navigation down the Atchafalaya from Simmesport to Morgan City. At 6:30 P.M., the same day, she departed Simmesport with the same two barges strung out and faced up to her head in the normal manner with two 1⅛" wires and ratchets on each side, two 1" wires criss-crossed as a jockey, and a 7" Manila Line as coupling.

At about 9:15 P.M., the JANE SMITH and her tow rounded a bend some three-quarters of a mile above the

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[1]The JANE SMITH was a typical Mississippi River towboat. She was a single screw vessel, 100 feet in length, 22 feet in beam, with a molded depth of 8 feet, 3 inches, powered by one 1600-hp General Motors Diesel engine, pilot house controlled. She had one steering and two flanking rudders. She was built for petitioner Smith at Houston, Texas, and was completed in June, 1948.

[2]46 U.S.C. 186 reads:

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

[3]The barges were each 240 feet long by 50 feet wide.

Texas and Pacific Railroad Bridge at Melville, Louisiana. Her skipper, Captain Weldon, signaled for the bridge to open, reduced speed and lined up his flotilla on the draw. The Melville Bridge is supported on cylindrical concrete piers. The draw is a lift span 160 feet wide with no approach fenders. The solid span of the bridge has a width of 800 feet. At the time, the Atchafalaya River was at high stage with a downstream current between four and six mph. The set of the current was to the east into the bend, with the reverse current coming out of the bend setting slightly to the west. It was this reverse current which would affect the navigation of downbound vessels approaching the bridge and lining up on the draw.

The bridge did not respond to the signals of the JANE SMITH to open. Captain Weldon and Captain Verret, conning the flotilla from the wheel house of the JANE SMITH, allowed the flotilla to drift down to within 200 feet of the bridge before backing away for a new approach. Without a second signal, the JANE SMITH again made a run on the closed bridge, only to back away a second time. After further signaling, the bridge was opened and the JANE SMITH made her approach. By this time the flotilla, instead of being lined up with the draw, slightly to the east to allow for the set west, was on a 45° angle to port, probably the result of backing the single screw[4] of the JANE SMITH.

Despite the angle, the JANE SMITH continued her approach until the port bow of the lead barge collided with the inner side of the east pier of the draw, veering the head of the tow sharply to the west, and pivoting the towboat

[4]See Knight, Modern Seamanship (8th Ed.) pp. 337-342.

to the east despite engine and wheel attempts to counteract the forced direction of the tow. The starboard side of the lead barge then struck the west pier of the draw, snapping the starboard face lines of the tow and swinging the JANE SMITH to port and broadside of the current. When the JANE SMITH jacknifed around the east pier, the port face wires parted and the superstructure of the vessel fetched up against the fixed span of the bridge, the bottom girders of which were some 18 or 20 feet above the surface of the water. The current swept the hull of the vessel under the span, causing her to heel so that her starboard side up to her deckhouse was awash. After passing under the span, the JANE SMITH righted herself and sank within seconds. Captain Verret, one of the claimants here, survived but her master, Captain Weldon, and four other members of her crew went down with their ship.

MOTION TO DISMISS

On May 31, 1960, the Oil Transport Company, Incorporated, charterer of the JANE SMITH and the two barges, filed one of the two limitation proceedings which compose this litigation. The other proceeding[5] was filed by the owner of these vessels on April 11, 1951. In neither proceeding was the JANE SMITH or the barges surrendered to a trustee appointed by the court, nor was a deposit or interim stipulation filed as required by the limitation of Liability Act.[6] It was represented in the plead-

[5]Since the owner is exonerated from lability, no determination of the validity of his limitation petition is made herein.

[6]46 U.S.C. #185 reads:

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this

ings in both petitions that the JANE SMITH was a total loss and, consequently, no stipulation was required. It was further represented that if and when the vessel was refloated, a stipulation would be filed at that time covering her value, less refloating costs. The vessel was eventually refloated, and on November 19, 1951, a stipulation in the amount of $25,000 was filed. Prior to the filing of the stipulation, on January 24, 1951, claimants herein moved to dismiss the limitation proceeding filed by the charterer on the ground that the petitioner had failed to comply with the limitation statute in that it had failed either to surrender the vessel to a trustee appointed by the court or to file an interim stipulation covering her value, and that the six months allowed by the statute[7] for compliance therewith had passed.

At the time this motion to dismiss was argued, it was denied. This Court decided to hear all the evidence in the case before making a final determination with respect to the motion. It is now the holding of this Court that the motion is good and should be granted because of failure of petitioner to comply with the limitation statute. 46 U.S.C. #185. At the time the motion was filed, there was

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chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for hte benefit of claimants, to a trustee to be appointed by the court his interest in th vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

[7]See Note 6.

no *res* before the Court, six months had elapsed from the time the first claim was filed and, consequently, petitioner's right to limit no longer existed. *Petition of Goulandris*, 2 Cir., 140 F.2d 780. Compare *Black Diamond Steamship Co. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386.

Moreover, although it was represented by the charterer in its petition for limitation that the JANE SMITH was a total loss and that no stipulation, however small, was required to preserve the right to limit, it now appears that a lifeboat of the JANE SMITH was salved, together with the two barges. Since this was an integrated tow, and the barges and the tug had the same charterer and owner, these barges, or their value, should have been surrendered.[8] It is noted that in obtaining its injunction pursuant to the limitation proceedings, petitioner was careful to include the barges under its protection.[9] In addition, the third party claim of the JANE SMITH against the railroad was not surrendered[9] and petitioner has allowed this claim to prescribe. Now the petitioner argues that the claim was worthless, but the allegations in its limitation petition would indicate otherwise.[10]

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[8] *Sacramento Navigation Company v. Salz*, 273 U.S. 326; *Standard Dredging Co. v. Kristiansen*, 2 Cir., 67 F.2d 548; *Short v. The Columbia*, 9 Cir., 73 Fed. 226.

[9] See *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 5 Cir., 196 F.2d 199, 201.

[10] Allegation 22 of the limitation petition reads as follows:

"The casualty above described was in nowise caused by any fault, neglect, want of care or design on the part of petitioner, or any of its agents, or anyone for whom petitioner may have been responsible, and occurred without their privity or knowledge; and said casualty was the result of, and was caused solely by the failure of the drawspan of the bridge to open promptly as required by law, the absence of fender pilings and other protective works around the draw, and the strong, swift and irregular eddies and currents of the River, over all of which petitioner and its agents had, and could have had, no control, and the effects of which, despite the exercise of all due care and skill, they could not avoid."

In spite of the holding that the petition for limitation must be denied for failure to comply with the statute, since the issue of limitation has been fully tried on the merits, this Court will enter its findings thereon, for use in the event an appellate court finds the denial improvident. Thereafter, this Court will proceed to decide the bareboat charterer's liability to the claimants in suit.[11]

LIMITATION

Various charges of unseaworthiness to which the charterer and his representative were privy[12] have been leveled at the JANE SMITH and her tow by the claimants. It is charged that the steering rudder of the JANE SMITH was inadequate to control the vessel under tow, that the rudder stock was defective and had sheared from the hull before the casualty in suit. Neither of these charges is proved. The credible evidence demonstrates that the rudder was fully capable of handling the JANE SMITH under tow. The evidence also shows that her rudder stock was sheared in refloating the vessel.

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[11] See *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U.S. 207, 1927 A.M.C. 402.

[12] See 46 U.S.C. #183 (a) and (e) which read:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

Other than the testimony of a disgruntled former employee and a self-educated expert, the only support for claimants' position with reference to the inadequacy of the rudder and the defect of its stock was the failure of the JANE SMITH to respond to hard left rudder after her lead barge had struck the east pier of the draw of the bridge and veered the tow to starboard. The force of the collision with the pier and the force of the current on the tow, approaching, as it was, at a 45° angle to its thread, were fully sufficient to overcome the effect of the hard left rudder.

A second charge of unseaworthiness revolved around testimony from two interlopers who say they came aboard the vessel as she was mooored at Simmesport. They testified that the wire cable on the JANE SMITH, which was to be used in making up the tow, was frayed and obviously unfit for that purpose. The parting of the cable at the time of the casualty is also pointed to by claimants as support for this charge. Again the evidence will not support this charge of unseaworthiness. The evidence shows that the wire cable on the JANE SMITH was relatively new, and certainly the collision with the east and west piers of the bridge was easily sufficient to part the cable. In fact, minor collisions with tows usually result in broken lines.

The claimants also charge that the JANE SMITH was improperly manned for a trip down the Atchafalaya at high stage of the river. They say that Captain Verret was not experienced in the JANE SMITH type of towboat and, therefore, would be of little assistance to Captain Weldon in negotiating the hazards of the treacherous Atchafalaya. The evidence shows that Verret, while not experienced in

pusher-type towboats, was nevertheless a veteran towboatman with extensive exposure to this river. He was what is called a posted pilot, having been down the River thirty days of the incident in suit. He was sent aboard for the trip to advise Captain Weldon, himself an experienced boatman, but new to the Atchafalaya and its vagaries.

The last charges of unseaworthiness revolves around the fact that the fore and aft doors in the watertight bulkheads leading to the engine room spaces on the JANE SMITH were allowed to remain open, to the knowledge of the charterer and his representative. This charge is admitted, but this practice was not a proximate cause of the casualty in suit. When the JANE SMITH capsized, she was awash over her entire length on her starboard side up to her boat deck. In this position she easily made enough water to cause her to founder and sink. Under the circumstances, and in view of the speed with which the JANE SMITH sank, it cannot be said with assurance that the openings in the watertight bulkheads were a precipitating cause of the casualty.

EXONERATION

This casualty was caused by the failure of Captain Weldon and Captain Verret, both experienced masters and both conning the vessel at the time, to keep the tow from striking the bridge. When navigators bring a vessel in collision with a stationary object, a presumption of fault arises[13] and there is nothing in this record which would

[13] *The Oregon*, 158 U.S. 186, 197; *The Louisiana*, 70 U.S. (3 Wall.) 164; *The Granite State*, 70 U.S. (3 Wall.) 310; *Coyle Lines v. United States*, E *Cir.*, 195 F.2d 737; *The Victor*, 5 Cir., 153 F.2d 200.

put that presumption at issue.[14] In fact, all of the evidence supports the presumption. These navigators, instead of holding back in the four to six mph current until the bridge was opened, allowed the tow to drift down on the closed draw to such an extent that the JANE SMITH had to be backed away twice. In backing, the tow got out of line with the draw. Instead of bringing the tow back in line with the draw before making their final approach, these navigators tried to enter the draw on a 45° angle. This was not a mistake of judgment. This was gross negligence, unworthy of experienced seamen. Captain Waldon and Captain Verret were equally at fault, each was 50 per cent responsible for the casualty.

Decrees accordingly.

/s/ J. Skelly Wright
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
October 21, 1959

[14] See Griffin, Collision § 25.

APPENDIX B

Court of Appeals Opinion

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18155

OIL TRANSPORT COMPANY, INCORPORATED, and CHARLES C. SMITH COMPANY,
Appellants,

versus

LENNIS VERRET, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 17, 1960.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This appeal presents the question whether the failure of the bareboat charterer and owner to deposit any sum representing the value of a sunken vessel considered by them to be worthless, as ap-

proved security therefor, or to transfer to a trustee their interests in the vessel within six months after the filing of claims required a dismissal of limitation and exoneration proceedings filed by appellants. Charles C. Smith Company, the owner, and Oil Transport Company Inc., the bareboat charterer of the towboat Jane Smith, following the loss of the ship, filed their separate limitation proceedings under the provisions of 46 U.S.C.A. Section 183(a).[1]

In neither proceeding was the Jane Smith or the barges being towed by her at the time of the loss surrendered to a trustee appointed by the Court, nor was a deposit or security in any amount filed at the time of the filing of the proceedings or within a period of six months after claimants had filed their claims. This apparent disregard of the terms of the statute was at least partially explained by allegations in the petitions to the effect that the Jane Smith was a total loss.[2] This allegation was supported by affidavits as required by the rules. The omission was further sought to be justified by an offer contained in the petition to give a stipulation with sufficient security for the payment into Court of the amount of value of peti-

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[1] Section 183(a) provides as follows: "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[2] This allegation was as follows: "Efforts will be made to raise and save the Towboat JANE SMITH, but there is grave doubt as to whether that will be possible at all, or at a cost not exceeding the value recovered. For present purposes said vessel must be deemed a total loss, and her wreckage, strippings and proceeds have no value, and there is no freight pending, recovered or recoverable, all will appear from the affidavits annexed hereto."

tiners' interest in the Jane Smith "if said towboat or its wreckage, strippings or proceeds should be saved, and should be found upon reference, to have had any value while sunk, whenever such reference may be ordered," as provided by the statutes and applicable rules. The petition made no mention of the interest of the appellees in the barges which were a part of the tow at the time of the accident and which were owned by Smith and chartered by Oil Transport Company.

Appellees filed their several motions to dismiss the limitation and exoneration proceedings, asserting that the failure of the petitioners to surrender the vessel or to file a stipulation securing the interest of petitioners within six months of the filing of the claims deprived the Court of jurisdiction of the proceedings.

Subsequently, the Jane Smith was raised and the Trial Court required the filing of a stipulation and security by petitioners in the sum of $25,000. This was later raised to $170,000, the amount of $145,000 having been added by the Trial Court by reason of the fact that appellants had potential claims against the Texas and Pacific Railroad Company for loss of the vessel and crew. Thereupon, the Court overruled the motion to dismiss for want of jurisdiction over the proceedings.

Thereafter a full hearing was had on the appellants' claim for limitation of liability. Upon the conclusion of this hearing, after which the Trial Court made findings of fact, the court held that, by their proof, appellants had established their right to limitation but that they were denied the benefits of the limitation statute because of their

failure to comply with that part of the statute which required a deposit with the Court of a sum equal to the amount of interest of the owner or approved security therefor or a transfer to a trustee of appellants' interest in the vessel within six months of the filing of a claim. The Court based this on the fact that at the time the petitions were filed they incorrectly omitted the fact that a small boat belonging to the Jane Smith of the value of $100 was salvaged, that no value was assigned for the barges that were not damaged and that no amount was tendered or security offered for the value of a claim by appellants against the Texas and Pacific Railroad whose draw-bridge was the site of the damage.

Accepting as we must, since they were based on substantial evidence, the Trial Court's findings that the vessel was in no way unseaworthy, we affirm that part of the Court's decision which found that the right to limitation had been established if the Court had acquired jurisdiction to grant it on the pleadings and record which we have outlined above. This then, presents the clear cut question whether appellants' failure actually to tender the sunken vessel to a trustee or to tender an amount which, under its allegations, would be zero, or tender security therefor, in light of the fact that ultimately it appeared that there were values assignable to appellants' interests in the vessel, was jurisdictional in the sense that the Court could not try this limitation proceeding after subsequently requiring the filing of the stipulations for $170,000.

The Trial Court based its decision that the failure of appellants to surrender the vessel to a trustee or to file an interim stipulation covering her value deprived the

Court of the right to grant limitation on the terms of the statute itself, *supra* page 1, and on the case of Petition of Goulandris, (2nd Cir.) 140 F. 2d 780. The Court also noted a comparison with *Black Diamond Steamship Company v. Robert Stewart and Sons, Ltd.*, 336 U.S. 386. Claimants here also urge the Goulandris case as requiring affirmance of the Trial Court's order dismissing the petitions. No case is cited in which the Court has held that where a petition for limitation is filed correctly asserting that the vessel[3] had sunk and must be taken as a total loss, but it was later ascertained that petitioners' interest in the vessel was in fact of substanial value, there being no finding that the failure to stipulate a value initially was improperly motivated, the Admiralty Court would have no jurisdiction to proceed with the limitation proceedings upon a subsequent filing of a stipulation subjecting a substantial amount to the claims of the claimants.

The statute itself is not couched in such terms as to require a holding that the failure complained of deprives the owner of the right granted him under Section 183(a) to claim limitation. The procedural requirements are stated in U.S.C.A. Section 185, which reads as follows:

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of

[3]The proposition relied upon by the Trial Court and claimants that the term "vessel" in the circumstances of this case includes the barges as well as the tug and no mention was made of the barges will be discussed below.

> claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his proved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." (Omissions as in Opinion)

We think it quite plain that if nothing had been involved in the collision except the tug Jane Smith and if it was clear that no tort claim existed in favor of appellants against the railroad and if there had been no life boat of the nominal value of $100 recovered, the requirements of this statute would have been completely satisfied by the allegations actually contained in the petitions, stating that the Jane Smith was at the bottom of the river and was worthless, when coupled with an offer to stipulate in such amount as was later determined to represent any value recovered. We think it not at all correct to say that under these circumstances there would be no res in Court. Obviously it would add nothing to the validity of appellants' petition for them to file a stipulation in a nominal amount.

We then come to the question of whether, assuming what has not been proved, that is, that a valid tort claim existed on behalf of appellants against the railroad com-

pany,[4] the failure of the appellants to "surrender" such claim as they had against the railroad company would be fatal to the acquisition of jurisdiction over the proceedings.

The next question is whether the failure to surrender the barges or file a stipulation for the value of appellants' interest in the barges would deprive the Court of jurisdiction.

We finally come to the question whether the failure of appellants to surrender a life boat of the value of $100, which was recovered would deprive the Court of jurisdiction.

As has already been pointed out, the Trial Court did not make any finding to the effect that a valid claim had existed on behalf of appellants in the nature of a third party claim of the Jane Smith against the railroad. Even if the Court had made such finding, no finding has been made, and none would be permissible on the record before the Trial Court, that appellants intentionally waived or surrendered any rights against the railroads by permitting the cause of action to prescribe. Moreover, as pointed out by this Court in *Geotechnical Corp. v. Pure Oil Co.* (5th Cir.) 196 F. 2d 199, the value of this claim could be added after the six month period. It cannot, therefore, be said, we think, that on the record before the Trial Court it could determine that the failure to make any reference in their

[4] With deference to the Trial Court's reference in its findings to the validity of the claim against the railroad company as owner of the bridge, it should be pointed out that the allegations of the petition did not expressly charge the railroad company with liability for the loss. Moreover, the Court in its conclusions placed the entire blame on Captain Weldon, the pilot, and Captain Verret, the master of the Jane Smith. Their management of the vessel was termed by the Court "gross negligence unworthy of experienced seamen."

petitions to the possible claim against the railroad would amount to a failure of appellants to comply with the requirements of Section 185.

The Trial Court also commented in its finding on the failure of appellants to surrender the barges, both of which had the same charterer and owner as the Jane Smith. The Court cited for holding that they "should have been surrendered": *Sacramento Navigation Company v. Salz*, 273 U.S. 326; *Standard Dredging Company v. Kristensen* (2d Cir.) 67 F. 2d 548, and *Short v. The Columbia*, (9th Cir.) 73 F. 226. While we do not pass upon the correctness of this holding by the Trial Court,[5] it is noted that the Court itself did not require the stipulation, subsequently filed by appellants on order of the Court, to include the value of these barges. Moreover, it is plain that, absent any finding of bad faith on the part of appellants in failing to recognize the doubtful legal principle announced by the Trial Court, it cannot be said that their failure to surrender the barges amounted to a failure to comply with the requirements of Section 185.

Finally we come to the matter of the lifeboat. Even though this nominal item was not adequately covered by the allegation that the vessel was sunk and a total loss, and her wreckage, strippings and proceeds had no value, but upon salvage would be made the basis of the filing of a stipulation of its value if, upon reference any was found,

[5] It is quite doubtful that in any action in rem for death or injury to the crew the principle of "integrated tow" announced by the Supreme Court in the Sacramento Navigation case is applicable. The Supreme Court in that case distinguished its earlier decsiion in Liverpool etc. Navigation Company v. Brooklyn Terminal where it was expressly held in a limitation proceeding as against a tort claimant that the tug alone was the vessel at fault and the barges need not be surrendered. Liverpool etc. Navigation Company v. Brooklyn Terminal, 251 U.S. 48.

the failure to file a stipulation in the sum of $100 in light of the posture of the proceedings could not be determinative of the jurisdiction of the Court to proceed in the matter. So far as appears from the record the allegations of no value were in good faith. The matter was then ripe for claimants to traverse the allegations and require the filing of a stipulation representing the true value of the vessel if they took issue with the petitioners' allegation of no value.

We think there is nothing in the Goulandris case, *supra*, that would require a holding that in the circumstances here present the Trial Court lacked jurisdiction to entertain jurisdiction of the limitation proceedings. The Court pointed out expressly in that case that the entire proceedings failed to comply with the requirements of the statute in that they did not tender into court any res, the vessel involved there actually having substantial value but being merely physically unavailable to be surrendered. Here the petitioners clearly tendered the vessel alleged to be worthless and tendered such stipulation as, upon reference, the Court might find the true value to be. We think this brought the case more clearly under the doctrine announced by the Supreme Court in the Black Diamond Steamship Company case, *supra*, where, the petitioners having filed a stipulation less than one-third of the correct amount, the Supreme Court held that the Trial Court erred in dismissing the limitation proceedings and directed that they be reinstated and that the petitioners be permitted to amend their stipulation to the correct amount. The Court expressly stated that the filing of a correct stipulation was not jurisdictional.

It is not entirely clear what disposition the Trial Court made of the Smith Company's petition for exoneration. In its opinion the Court stated "Since the owner is exonerated from liability, no determination of the validity of his limitation petition is made herein." Nevertheless, in the final decree the Court held expressly that the petitions for limitation of liability filed by Oil Transport Company, Inc., and Charles C. Smtih Company, were denied. It is clear that the denial of the petitions for limitation by the Trial Court were based on its conclusion that there had been a failure of petitioners to comply with the statutory requirement of a surrender of the vessel or the alternative filing of the stipulation. This conclusion we have found to be in error.

The judgment is therefore REVERSED and the cause remanded to the Trial Court for further proceedings not inconsistent with this opinion.

A true copy
Test:

/s/ Edward W. Wadsworth
EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

APPENDIX C

Judgment, Court of Appeals, Fifth Circuit

Extract from the Minutes of May 17, 1960

OIL TRANSPORT COMPANY, INCORPORATED, and CHARLES C. SMITH, COMPANY,

No. 18155,

versus

LENNIS VERRET, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the Trial Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Lennis Verret, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX D

STATUTES AND RULES INVOLVED

The statutes and Supreme Court Rules involved in this case, in pertinent part, are as follows:

1.

LIMITATION OF SHIPOWNER'S LIABILITY ACT, 46 U.S.C. 185.

"*Petition for limitation of liability; deposit of value of interest in court, transfer of interest to trustee.* The vessel owner, within six months after a claim and shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the

owner with respect to the matter in question shall cease."

2.

UNITED STATES SUPREME COURT GENERAL ADMIRALTY RULES.

Rule 51—Limitation of Liability—How Claimed **(Extracts)**

"The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U.S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not

fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporation surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation if filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act."

"Upon filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in

respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge."

Rule 46½—Findings of Fact and Conclusions of Law.

"In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Appellate Court under Rule 49."

3.

WESTERN RIVERS NAVIGATION RULES, 33 U.S.C. 351.

Rule 26—Usual Additional Precautions Required.

"Nothing in sections 302-352 of this title shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 388

LENNIS VERRET et al.,
Petitioners

versus

OIL TRANSPORT COMPANY, INC. et al.,
Respondents

OPPOSITION TO PETITION FOR CERTIORARI

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans,
Attorney for Respondents

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OPPOSITION TO PETITION FOR CERTIORARI

The Facts

Certain omissions from, and inaccuracies in, the statement of facts by the petitioners for certiorari, make it necessary to restate some of the facts, in order to present the case in its proper perspective.

The Towboat *Jane Smith* sank under the circumstances outlined on pages 9 and 10 of the petition for certiorari. Her owner and her charterer petitioned for exoneration from, or limitation of, liability.

Bonds for costs were filed;[1] but since the vessel was an apparent total loss (lying at a depth of ninety feet, at the bottom of the Atchafalaya River), and her strippings had no apparent value, no stipulation for value was filed at that time.

However, each petitioner for limitation stated that it was ready, willing and able to give a stipulation for value, with sufficient security; and each prayed that its interest in the vessel and her strippings be appraised, and that the Court then enter an order fixing the amount of the stipulation to be filed. R 12, 13, 65, 66.

Affidavits filed with each petition showed that the vessel had no apparent value; and the District Court accordingly entered orders to the effect that no stipulations need be filed for the time being, reserving to all claimants the right, at any time, to demand a further appraisement, and the filing of such stipulations as might be shown to be required by such appraisement. R 23-26, 76-79.

Several months after the filing of Oil Transport Company's petition for limitation, the claimants filed exceptions thereto, on the principal ground that no stipulation had been filed. R 50.

On March 29, 1951, the District Court expressly overruled these exceptions, without reservation, and

[1] Contrary to the repeated misstatement in the petition for certiorari. Certified copies of the cost bonds have been filed with the Clerk of this Court.

ordered an appraisement, by two appraisers, of Oil Transport Company's interest in the vessel. R 52-54.

On July 28, 1951, on motion of the claimants themselves, in which the petitioners for limitation joined, the District Court rescinded its order for appraisement, because the vessel had not been raised, and any attempt at appraisal would have been futile. R 107.

On November 19, 1951, immediately after the *Jane Smith* was raised (a year and a half after her loss), the petitioners for limitation filed a stipulation for $25,000, to cover any net value which their interest might be found to have. R 114. On the same day, the District Court entered an order expressly approving the stipulation. R 111.

This stipulation was not challenged for more than five years. Then, on March 26, 1957, the claimants renewed their exception to the petitions, again alleging failure "to give a stipulation, at the time of the institution of these proceedings, as required by law . . ." R 117.

On May 9, 1957, the District Court again expressly overruled the exception, without reservation. R 118.

On August 11, 1958, the petitioners for limitation moved to exclude all claimants but one, from participation in the exoneration or limitation phases of the proceeding, on the ground that, despite the lapse of some eight intervening years, these claimants had

never filed answers, as required by this Court's Admiralty Rule 53, to the petitions for limitation. R 119.

On October 1, 1958, the District Court, having permitted answers to be filed on that date, overruled this motion to exclude the claimants from participation in the proceeding, on the stated ground that "answers have now been filed". R 159.

On May 20, 1959, the District Court entered its order *ex proprio motu*, requiring the petitioners for limitation to show cause why their petitions should not be dismissed on the ground "that said petitioners under the law are required to account in the limitation proceeding for any recovery which may have been realized" in their hypothetical claim against the Texas & Pacific Railroad Company, owner of the bridge with which the *Jane Smith* had collided, and that the petitioners had not prosecuted a claim against the railroad in that regard. R 163.[2]

On June 3, 1959, the rule to show cause was discharged on condition that the petitioners for limitation increase their stipulation from $25,000 to $170,000, an arbitrarily selected figure, being the insured value of

[2] All claimants have themselves sued the Texas & Pacific Railway Co., but they have not brought their actions to trial. If the railroad's fault caused or contributed to the casualty, the claimants can recover their full damages from the railroad directly. As noted by the Court of Appeals, however, the District Court "placed the entire blame" on the master and pilot of the *Jane Smith*. The claimants are, in any event, not entitled to double recovery of their damages. It accordingly appears that prosecution for the benefit of the claimants, of any claim the petitioners for limitation may have against the railroad, could add nothing to the claimants' rights or recovery.

the towboat at the time of the accident.[3] R 170.

On June 11, 1959, the petitioners for limitation filed the increased stipulation (R 172), and it was approved by the Court on June 12, 1959. R 171.

Following trial on the merits, the District Court, although holding expressly that Charles C. Smith Company "is exonerated from liability" (R 1193, footnote 5), and that Oil Transport Company is entitled to limit its liability on the merits (R 1196-1198), nevertheless reversed its three previous holdings that the petitioners for limitation had timely filed adequate stipulations for value, and held that "there was no res before the court (when) six months had elapsed from the time the first claim was filed and, consequently, petitioner's right to limit no longer existed" (R 1194); and the Court thereupon entered an interlocutory decree dismissing both companies' petitions. R 1200.

The Court's decree makes no reference to liability for the casualty. However, in its opinion, it held Oil Transport Company (the charterer) liable on the ground that Captains Weldon and Verret were "each 50%" negligent, in attempting to pass through the bridge at an improper angle of approach. R 1199.

On appeal by the petitioners for limitation (none of

[3] The District Court apparently failed to realize that if either petitioner for limitation was at fault (a prerequisite to the existence of any liability to be bonded in this proceeding), the value of any claim they might have against the Railway could not exceed one-half the value of the towboat. *Halcyon Lines vs Haenn Ship Corporation*, 342 US 282 (1952).

the claimants appealed), the Court of Appeals reversed the District Court's judgment, on the ground that under the circumstances of the vessel's loss, the fact that the stipulation for value was not filed with the petitions for limitation, was not fatal to the petitions.

Certiorari Is Not Warranted

The petition for certiorari presents an aggregate of fourteen stated questions for review (numbered question 4 comprises three stated questions). None of these questions warrants exercise by this Court of its certiorari jurisdiction.

a

Questions 1, 2, 3, 4a, 4b, 4c, 5, 8, 9 and 10 all turn primarily on the question whether the fact that the stipulation for value was not filed with the petitions for limitation, but only when the vessel was salved, was fatal to the petitions.

The negative answer by the Court of Appeals is in full accord with applicable decisions of this Court. In *In re Morrison*, 147 US 14, 34 (1893), this Court held directly that the filing of a petition for limitation of liability, "with the offer to give a stipulation", conferred jurisdiction on the district court, "and no subsequent irregularity in procedure could take away such jurisdiction".[4]

[4] In *Norwich Co. vs Wright*, cited by petitioners for certiorari, this Court again directly classified the matter of the stipulation for value as one of procedure, not jurisdiction: "But in

In *Black Diamond Steamship Corporation vs Robert Stewart & Sons*, this Court reversed the dismissal of a petition for limitation on the ground of insufficiency of the stipulation, because "the defect was not jurisdictional". 336 US 386, 395 (1949).

In the case at bar, the petitioners for limitation initially prayed for an order fixing the amount of the stipulation required, and declared their readiness to give such stipulation as the Court would require; on motion of the claimants themselves, appraisal to fix the amount of any stipulation to be required, was postponed; and the petitioners complied promptly and fully with all orders subsequently entered by the Court as to the amount of the stipulation.

b

Questions 6 and 7 stated in the petition for certiorari—whether the limitation fund should include the value of the *Jane Smith's* barges, and of respondents' putative claim against the railroad bridge—are not presented for decision at this time.

Questions as to the elements and composition of the limitation fund have not yet been determined by the District Court. While the Court of Appeals made some passing comments on these questions, it stated expressly that it was not deciding them.

---

order to proceed regularly, the court must have possession of the limited liability fund. . . . (The shipowner) should file a proper petition (and) . . . give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability". 80 US 104, 124-25 (1871).

c

Question 12 reads: "Does the evidence justify holding Weldon and Verret (the master and pilot of the *Jane Smith)* each 50% negligent, and petitioners for limitation entirely free from fault?"

Since Oil Transport Company, as charterer of the vessel, was liable under the rule of *respondeat superior* for the negligence of her master and pilot, obviously that petitioner for limitation was not held free from fault by the District Court.

The question whether Weldon and Verret were properly held at fault cannot be raised by the petitioners for certiorari, because they took no appeal from the judgment of the Distict Court. Rule 12, third paragraph, Rules of the Court of Appeals, Fifth Circuit; *International Milling Co. vs Brown Steamship Co.*, 264 F2d 803 (CA 2-1959). This is, in any event, a fact question, as to which see discussion under point *d* below.

d

The final question stated in the petition for certiorari, and that on which the petitioners place greatest reliance, is No. 11—whether the judgment below should not be reversed on the ground that the vessel was unseaworthy for want of a lookout at the head of the *Jane Smith's* tow, with the privity and knowledge of the petitioners for limitation.

This is of course a question of fact, and this Court has frequently declared its disinclination to review fact questions, especially if the courts below are in agreement.[5]

The petitioners for limitation seek to avoid this hurdle by stating that neither of the Courts below passed on the lookout question.

In fact, the question was briefed and argued in, and was passed on by, both the District Court and the Court of Appeals.

It should be borne in mind that in the courts below, the present petitioners for certiorari attacked the vessel's seaworthiness on every conceivable ground—instability, defective rudder, inadequate rudder, lack of sufficient watertight bulkheads, insufficient freeboard, insufficient crew, drunken crew, frayed cables, wooden doors, incompetent master, incompetent pilot, failure "to establish sufficient authority in" the pilot, lack of lookout facilities, broken searchlight, lack of lookout, insufficient life preservers, defective engine, improper make-up of tow, inadequate alarm bell, lack of posted notices to keep doors closed, and failure to hold lifeboat drills.

Thes contentions were not pleaded merely, but were gone into exhaustively at the trial (the record on

[5] See, *e.g. Fry Roofing Co. vs Wood*, 344 US 157 (1952); *Timken Co. vs United States*, 341 US 593 (1951); *Graver Mfg. Co. vs Linde Co.*, 336 US 271 (1949), on rehearing, 339 US 605; *Goodyear Tire & Rubber Co. vs Ray-O-Vac Co.*, 321 US 253 (1944); *Southern Power Co. vs North Carolina Public Service Co.*, 263 US 508 (1924); *Houston Oil Co. vs Goodrich*, 245 US 440 (1918).

the question of liability alone comes to 1214 pages), where their individual and collective lack of merit was clearly demonstrated.

In his written opinion (which properly took the place of formal findings of fact and conclusions of law[6]), the District Judge met this shotgun approach by dealing expressly with only those contentions of unseaworthiness which seemed sufficiently serious to merit discussion. The contention as to lookouts (along with many others) was dismissed without discussion, as patently without merit.

There is no "'arbitrary rule requiring tug operators to maintain a lookout on the lead barge of every tow regardless of the circumstances.' . . . The wording of the (navigational) rule itself . . . clearly reveal(s) that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent navigation, but show(s) that the question of competency of a lookout in any instance is primarily one of fact." *Parker Bros. & Co. vs DeForest*, 221 F2d 377, 380 (CA 5-1955), reaffirmed in *Wilson vs Oil Transport Co.*, 242 F2d 727, 729 (CA 5-1957), cert. den., 355 US 835.

The Third Circuit has similarly held directly that in circumstances of clear visibility, it is entirely proper to maintain the lookout from a bridge several hundred feet aft of the bow of a barge under tow (see also

[6] *Hecht, Levis & Kahn vs S/S President Buchanan*, 236 F2d 627 (CA 2-1956).

R 882-83). The Court pointed out further that the party asserting inadequacy of lookout must "show not only that there was an absence of proper lookouts, but also that such a lack of lookouts contributed to the collision". *The Mamei*, 152 F2d 924, 929 (1945), cert. den., 328 US 836. See also *Puratich vs United States*, 126 F2d 914 (CA 9-1942).

In this case, the bridge and the tow were in full view, and clearly lighted by the towboat's floodlight, at all times. R 284-86, 336, 615, 1035. Captain Weldon and pilot Verret, on duty in the wheelhouse, had broad and unobstructed visibility, in better perspective, from a vantage point far more comprehensive than that of a lookout at the head of the tow. Particularly, they were in a better position to judge the angle of approach to the bridge, just as a rifle can be aimed accurately only if both front and rear sights are in the rifleman's line of vision.

The petitioners for certiorari made no showing whatever that the presence of a lookout on the tow would have helped in any way to avoid the accident. There is not the slightest suggestion in the testimony of petitioner Verret, or of any of the other witnesses to the collision, of any causal relation between the casualty and the absence of such a lookout.[1]

Since the District Court's implicit fact finding in this regard was not clearly erroneous, the Court of Appeals

[1] Contrary to the misstatement in the petition for certiorari, the drawspan of the bridge was 160—not 110—feet wide, leaving a clearance of 55—not 30—feet on each side of the flotilla. R 6, 1191.

affirmed it. Rule 52(a), Federal Rules of Civil Procedure. No question is presented for consideration by this court. *Timken Co. vs United States*, 341 US 593 (1951), and the other cases cited in footnote 5 above.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Eberhard P. Deutsch,
Attorney for Respondents

September, 1960

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MAR 27 1961
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 388

LENNIS VERRET, et al.,
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OIL TRANSPORT COMPANY, INC., et al.,
Respondents

Petitioners and respondents suggest to the Court that the issues raised by the petition for certiorari herein have been rendered moot by entry, in the District Court, on March 21, 1961, on motion of proctors for all parties to said proceeding, of a final decree (a certified copy of which is annexed hereto, and a copy of which is printed on the reverse hereof) pursuant to the prior decree of the District Court as modified by the opinion of the Court of Appeals heretofore rendered herein, exonerating respondent CHARLES C. SMITH, from liability, and awarding to respondent OIL TRANSPORT COMPANY, INC., limitation of liability, fixing the amount of the limitation fund, and apportioning the fund among claimant petitioners, which decree has been satisfied by payment of the

amounts due thereunder, together with all costs, as per acknowledgment and satisfaction executed by proctors for all claimant petitioners (a certified copy of which acknowledgment and satisfaction is also annexed hereto, and printed on the reverse hereof).

JAMES J. MORRISON
Proctor for Petitioners

EBERHARD P. DEUTSCH
Proctor for Respondents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Nos. 503 and 512 (CONSOLIDATED)
IN ADMIRALTY
FINAL DECREE

In re: OIL TRANSPORT COMPANY, INCORPORATED
and
CHARLES C. SMITH COMPANY
Petitioning for Exoneration from,
and Limitation of, Liability

On joint motion of the undersigned proctors of record for petitioners OIL TRANSPORT COMPANY, INCORPORATED and CHARLES C. SMITH, and for claimants, MRS. JEAN D. RANDOLPH, MRS. MONETTE M. LYNCH, MRS. A. W. ASHLEY, MRS. ELIZABETH ASHLEY WORTHEN, MRS. LUCILLE E. WELDEN, MRS. GERTRUDE PICARD CUSHING and LENNIS VERRET,

IT IS ORDERED, ADJUDGED and DECREED that:

1—Petitioner CHARLES C. SMITH be, and he is hereby, exonerated from liability herein;

2—Petitioner OIL TRANSPORT COMPANY, INCORPORATED, is granted limitation of its liability herein, pursuant to the provisions of Sections 183 to 189 of Title 46 of the United States Code, as amended;

3—The limitation fund payable herein by petitioner OIL TRANSPORT COMPANY, INCORPORATED, under the stipulation heretofore filed by it herein, is fixed at the total sum of one hundred forty-seven thousand, three hundred sixty-eight and 00/100 ($147,368.00) dollars, and said fund is apportioned among the claimants herein as follows:

Mrs. Jean D. Randolph	$ 4,000.00
Mrs. Monette M. Lynch	$29,279.50
Mrs. A. W. Ashley Mrs. Elizabeth Ashley Worthen	$16,250.00
Mrs. Lucille E. Welden	$29,279.50
Mrs. Gertrude Picard Cushing	$29,279.50
Plus, for costs, fees and expenses	$10,000.00
Lennis Verret	$29,279.50

4—On payment to the respective proctors of record for each claimant, of the amounts fixed in paragraph 3 of this decree, petitioner OIL TRANSPORT COMPANY, INCORPORATED, and THE HOME INSURANCE COMPANY OF NEW YORK and MARYLAND CASUALTY COMPANY, its underwriters quoad the casualty described in these proceedings, and the Towboat *Jane Smith*, Barges NBC *891* and NBC *892*, shall be and remain forever discharged from

any and all liability, direct, contingent or derivative, for loss, damage, injury or death, and from any further claim, directly or indirectly arising out of, caused by, or consequent upon, said casualty;

5—No other claims having been filed in these proceedings, and all other persons, firms and corporations who or which have, or may have had, any claims, direct, contingent or derivative, for loss, damage, injury or death, directly or indirectly arising out of, caused by, or consequent upon, the casualty described in these proceedings, being in default, they are forever barred from making any such claim against petitioners, the Towboat *Jane Smith*, Barges NBC *891* and NBC *892*, the limitation fund as herein fixed, and THE HOME INSURANCE COMPANY OF NEW YORK and MARYLAND CASUALTY COMPANY, petitioners' underwriters quoad said casualty;

6—The *ad interim* stipulation, and all other stipulations for value, and bonds for costs, heretofore filed herein, are cancelled and released;

7—Each party herein shall bear his or its own costs, and any fees or costs which are, or may be, due to the clerk or marshal of this court, by any one or more of the claimants herein, shall be paid by claimant MRS. GERTRUDE PICARD CUSHING out of her share of the limitation fund fixed in paragraph 3 hereof.

New Orleans, March 21, 1961.

J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

DEUTSCH, KERRIGAN & STILES
Proctors for Petitioners
Oil Transport Company, Incorporated
and Charles C. Smith

BROWNE & RAULT
By GERARD A. RAULT
Proctors for Claimant
Mrs. Jean D. Randolph

RAYMOND H. KIERR
Proctor for Claimants
Mrs. Monette M. Lynch,
Mrs. A. W. Ashley and
Mrs. Elizabeth Ashley Worthen

ARTHUR A. DE LA HOUSSAYE
Proctor for Claimant
Mrs. Lucille E. Welden

JAMES J. MORRISON
Proctor for Claimant
Mrs. Gertrude Picard Cushing

MANDELL & WRIGHT
By JACK C. BENJAMIN and
JACK C. BENJAMIN
Proctors for Claimant
Lennis Verret

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Nos. 508 and 512 (CONSOLIDATED)
IN ADMIRALTY
ACKNOWLEDGMENT OF PAYMENT AND SATISFACTION OF DECREE

In re: OIL TRANSPORT COMPANY, INCORPORATED
and
CHARLES C. SMITH COMPANY
Petitioning for Exoneration from,
and Limitation of, Liability

Now come claimants, MRS. JEAN D. RANDOLPH, MRS. MONETTE M. LYNCH, MRS. A. W. ASHLEY, MRS. ELIZABETH ASHLEY WORTHEN, MRS. LUCILLE E. WELDEN, MRS. GERTRUDE PICARD CUSHING and LENNIS VERRET, appearing herein through their respective proctors of record, each of whom acknowledges that the limitation fund herein fixed in the total amount of $147,368, and apportioned among claimants as directed in the decree of this court herein dated March 21, 1961, has been paid in full; and each claimant, through his or her respective proctor or proctors of record, acknowledges receipt in full of his or her proper portion of said limitation fund as fixed in said decree, as follows:

Mrs. Jean D. Randolph	$ 4,000.00
Mrs. Monette M. Lynch	$29,279.50
Mrs. A. W. Ashley Mrs. Elizabeth Ashley Worthen	$16,250.00
Mrs. Lucille E. Welden	$29,279.50

Mrs. Gertrude Picard Cushing	$29,279.50
Plus, for costs, fees and expenses	$10,000.00
Lennis Verret	$29,279.50

and each of said claimants, through his or her respective undersigned proctor or proctors of record, hereby authorizes the clerk of this court to enter, in the record of these proceedings, satisfaction of said decree, with all costs.

BROWNE & RAULT
By GERARD A. RAULT
Proctors for Claimant
Mrs. Jean D. Randolph

JAMES J. MORRISON
Proctor for Claimant
Mrs. Gertrude Picard Cushing

RAYMOND H. KIERR
Proctor for Claimants
Mrs. Monette M. Lynch,
Mrs. A. W. Ashley and
Mrs. Elizabeth Ashley
Worthen

MANDELL & WRIGHT
By JACK C. BENJAMIN and
JACK C. BENJAMIN
Proctors for Claimant
Lennis Verret

ARTHUR A. DE LA HOUSSAYE
Proctor for Claimant
Mrs. Lucille E. Welden